9

# IN THE CASE OF ROBERT MORRIS,

A BANKRUPT.

---

On the motion to set aside a supersedeas, and order a procedendo:—

Hopkinson, J.—

On the 28th day of July, 1801, a commission of bankruptcy was issued, by the District Judge for the Pennsylvania District, against Robert Morris, directed to John Hallowell, Joseph Hopkinson, and Thomas Cumpston, Commissioners. The bankrupt being duly summoned, surrendered himself to the commissioners, and submitted himself to be examined; the commissioners having previously declared the said Robert Morris a bankrupt. On the 6th day of August, the commissioners received proof of sundry debts. On the 26th of August proof of debts was received from about twenty-one creditors: and the choice of assignees postponed until the 12th day of September. On that day further proofs of debt were received from nearly forty of the creditors of the bankrupt. At several subsequent meetings of the commissioners proofs of debts were continued to be received, amounting in the whole to upwards of ninety, and whose aggregate amount of debt, was about three millions of dollars. On the 8th day of December, 1801, the commissioners executed an assignment of all the estate and effects of the bankrupt to John R. Smith, Esquire, and John Craig, and Nathan Field, Merchants, they being the assignees chosen by the creditors. Here the proceedings by and before the commissioners stop. The assignment still remains among the papers of the commission, never having been accepted by the assignees, nor any counterpart executed by them. No attempts were made by or on the part of the creditors to call upon the assignees to execute the trust, nor to have other assignees appointed to supply their place and take charge of the estate and effects of the bankrupt. It may here be remarked that the petitioner now before me made no proof of his debt before

the commissioners, or took any part in the proceedings under the commission. The estate and effects of the bankrupt, whatever they were, were thus abandoned by the creditors; not only by those who had proved their debts, and neglected or declined to use the rights they had under the commission, but by those also who by not proving exhibited even more indifference to his affairs. It cannot be believed, indeed it is not pretended, that the petitioner, being in the city where these proceedings were going on, was not acquainted with them. At all events he had the notice which the law required and which was given to the creditors of the bankrupt generally.

Things remained in this situation, in a state of absolute inaction, and without any symptom of a revival, until the month of November 1825, that is twenty-four years, within a few days. In the mean time, that is, in the month of , 1806, Robert Morris, the bankrupt died. On the 21st day of November, 1825, Henry Morris, one of the children of Robert Morris, presented his petition to the Honorable Richard Peters, then Judge of the District Court of the United States, for this district, the same who had issued the commission, in which he recites the proceedings under the commission, and alleges that the assignees do not appear ever to have accepted the trust: nor have they executed any counterpart of the assignment: nor has there been, as he believes, anything further done in the premises. He states that the said Robert Morris, died in 1807, (1806) leaving a widow and five children, whereof the petitioner is one. He then alleges and sets forth, "That at the time of the said bankruptcy, the said Robert Morris was seized, and possessed of a large estate, real and personal, which, in consequence of the neglect of the said creditors and assignees, in not duly prosecuting the said commission, has been wasted and misapplied, without benefit to the creditors or to the bankrupt." This allegation has not been disproved, nor as I recollect, denied to be true, from that time to the present. It is the ground and reason on which the petitioner, Henry Morris, prayed the District Judge "that the said commission of bankruptcy may be vacated and superseded."

This petition, as appears by an indorsement on it, was read, filed, and a rule granted to show cause, &c., returnable on 26th December, 1825. On that day the rule was enlarged till 13th January, 1826. No further proceeding was then had, for reasons which do not appear, nor does it appear to whom the rule to show cause was directed, nor that any service of it was made.

On the 15th of January, 1830, the application on behalf of Henry Morris, was renewed to me; and Mr. Williams was heard as the counsel for the petitioner. No counsel appeared to oppose it. On the 22nd of the same month, I ordered, that notice of the application be specially given to John H. Huston, the petitioning creditor; and a public notice, in the National Gazette, three times a week for two weeks, to all the creditors of the bankrupt, that the judge will

proceed to hear and decide upon the petition on Friday the 19th of February, 1830.

On that day proof was given that the notices, respectively, had been given in conformity with the order. The application then rested until the 17th of the following September, during the whole of which time it cannot be doubted, that any application or argument, in opposition to the petition would have been attended to. On the 17th of September, no opposition being made, either by the creditors who had proved under the commission, or by any other person claiming to be a creditor, or to have any right or interest in the estate of the bankrupt—the order was made "That the commission issued in the case be vacated, and superseded, according to the prayer of the petitioner."

How far these proceedings were known to the creditors of Mr. Morris by the public notice given to them, I cannot say; Mr. Sansom, in a way which has not been satisfactory to the opposite counsel, has denied a knowledge of them, or rather as they say, that he had notice of them; perhaps this criticism is rather too close and verbal, as it would involve Mr. Sansom in an equivocation equal to an untruth, under his solemn affirmation, which ought not to be imputed to him, without a more satisfactory demonstration. The proceeding on the petition of Henry Morris, was not hurried. It was pending nearly five years. If in that time it was known to Mr. Sansom or any other of the creditors of Robert Morris, it was also known to them in law if not in fact, for the petition was open to them, that the application for the supersedeas was made on the ground that Robert Morris was possessed of a large estate, which, in consequence of the neglect of the creditors and assignees, was wasted and misapplied; and it was also clearly understood, for otherwise the supersedeas would be fruitless, that something remained to be redeemed from the neglect by which so much has been lost, and which, if redeemed, would enure to the benefit of the creditors, if they would look after it; or to the family of Mr. Morris, if the creditors by abandoning it would suffer it to return to the legal representatives of the bankrupt, by superseding the commission.

The effect of the supersedeas, if lawfully ordered, was to annihilate the commission, and to place the bankrupt with his estate and effects in the same situation they would have been in, had it never existed. He, or, in this case, his representatives, were fully restored to all their rights over his property, and resumed the management, control and disposition of it. So they remained, unquestioned and undisturbed, until the 8th day of December, 1836—a period of more than six years. On that day the petition of William Sansom was filed, followed by his affidavit, on the 15th of the same month. The petitioner states that he was a creditor of R. Morris, by a judgment, upon which there is due the sum of $9,484 12, with interest from the 23d of December, 1805; and also by another judgment obtained by John Dunwoody, for a large amount. He sets out the commission

of bankruptcy against Mr. Morris, and his certificate of discharge: says that he has learned that a supersedeas has lately been granted, but has not been able to learn upon whose application, or upon what grounds. He represents that no notice was given to him, or, as far as he can learn, to any other creditor, of the application for the supersedeas: that he has a considerable interest in proceeding under the commission, and is advised, that if the power exists to take it away, it cannot be exercised without due notice, and an opportunity to be heard: he therefore prays for a review of the proceedings, in reference to the alleged supersedeas, and that he may be heard by counsel in opposition to it. The affidavit verifies the petition, particularly as to his having no notice of the application for the supersedeas. I cannot forbear to remark that some of the allegations in this petition are rather singular, without meaning to say that they will have any weight in deciding upon it. The petitioner says, that although he has learned that a supersedeas has *lately* (six years before) been granted—he has *not been able to learn* upon whose application, or upon what grounds it was done. He has not informed us how he learned that the supersedeas was granted, nor what means he took after he was informed of it, to discover who was the applicant for it, nor the grounds upon which it was granted. Certainly in the same office where he filed his petition, the petition of Henry Morris was filed six years before, and there remained, and that petition shows the ground of the application. The proceedings of the judge upon that application were filed in the same place, and were equally accessible to Mr. Sansom. It is true that he does not aver that he took any step or measure to obtain this information, unless such an averment may be inferred from his declaration that he had not been able to obtain it. The petitioner, as the ground, and, I may say, the only legal ground of his application to revoke the supersedeas, and restore the commission, alleges, "that he has a considerable interest in proceeding under the commission." It cannot be overlooked, that his interest in the commission was so inconsiderable in his own estimation, that although living in the city where the commissioners sat, and where from time to time the creditors of the bankrupt were appearing and proving their debts, he never, for thirty years, during the pendency of the commission, thought it worth his while to give half an hour to the proof of his debt, or to the interest he had in the commission. How far an interest has since arisen which can assist him in this application, will be a subject of future consideration. At present I refer to these circumstances, not as impairing his legal rights, but as affecting his equity, if he shall be thrown upon that to support himself.

This case is altogether one of the first impression here, and, in some of its features and aspects, without precedent in England, where so many volumes have been published upon their bankrupt laws. The counsel engaged in the argument on both sides, have

given unwearied labour to their investigations, and although so many days have been appropriated to the hearing, my attention has been required and willingly afforded to every part of it. I may be tedious in developing my views of the leading matters and questions which have been discussed, but I would rather be so, than overlook what either party may deem to be important.

The first question which presents itself, is the jurisdiction or authority of the District Judge of the United States over the subject-matter of the petition of Henry Morris—that is—had he the power to grant the prayer of that petition, and to make the order to supersede the commission of bankruptcy, then in operation against Robert Morris. This question has been argued on the basis of the powers of the Lord Chancellor in England, under the British statutes of bankruptcy, and this inquiry was pursued in two divisions. 1. What are the powers of the Lord Chancellor, and from what source does he derive them? 2. Has the District Judge the same power in the execution of our Act of Congress, as are exercised by the Chancellor?

It is true that no case has been shown where the Lord Chancellor has superseded a commission of bankruptcy under circumstances like those of the present case; but these circumstances are really so extraordinary, that one may say they have never before occurred, and are not likely to occur again. We have here a commission taken out against a bankrupt, who was the possessor of an immense real and personal estate, labouring under incumbrances of unknown amounts. The commission proceeds so far, as that creditors having debts of three millions made the regular proofs before the commissioners. An election was duly held for assignees, and they were chosen —a large number of the creditors attending for that purpose. The assignees never accepted the trust—never executed a counterpart of the assignment, and the whole proceeding stopped. After the commissioners had executed their assignment, which was on the 8th of December, they met no more, nor was a movement made by any creditor of the bankrupt who had or had not proved under the commission to call the commissioners together, to have the assignees appointed, or to move one step further with the commission; and so it remained for five and twenty years, when the supersedeas was applied for; and so that application remained for five years longer, without a stir on the part of any creditor to proceed with the commission. We cannot be surprised that no such a case has been found in England, and we must therefore look rather to the principles on which the Chancellor has raised his power in cases of bankruptcy, than for any precedent like this. Creditors to the amount of three millions, taking such an interest in the commission as to go through the trouble and formality of proving the debt; attending afterwards to choose assignees to take charge of those interests, and then suddenly abandoning the whole concern, and never, to this hour, returning to it.

To ascertain the nature and extent of the jurisdiction of the Lord Chancellor, over cases of bankruptcy, we must inquire what is the source from which he derives it, and how has he drawn his powers from that source. I think an examination of the authorities on this subject will show, that all his powers are derived from the statutes of bankruptcy; that he has none as a Court of Chancery—not one that he has not drawn either from the express authority of those statutes, or by the constructions and implications he has thought he might fairly make, being found necessary for the just and full execution of those statutes, to give to them all the benefit to the bankrupt and his creditors intended by the legislature, and to prevent any wrong and injustice by the abuse of them. Numerous cases have been cited, which show, that the authority to supersede a commission of bankruptcy, which is exercised without question by the Lord Chancellor, extends over a large field; indeed, no precise boundaries appear to be marked for it. The Chancellor interferes in this way on very broad and general principles, for the purposes of justice, and to prevent an abuse of the bankrupt laws, to the prejudice of the bankrupt, as well as of the creditors. They are both under his protection, and he takes care that the true intentions of the legislature in making the statutes, as he understands them, shall be carried into effect, and shall not be perverted, either by the bankrupt, or by his creditors, to the work of injustice. This is the broad principle on which he acts, and, without any express words in the statutes, he assumes that his powers are commensurate with these objects. But as this extent of power is not expressly granted to him by the language of the statutes, it is argued that he exercises it by virtue of his general Chancery jurisdiction; that he takes this authority to himself because he is the Lord Chancellor, and holds the great seal; and not because he is the person or officer designated in the bankrupt law to issue the commission: in short, that he has the authority only to issue the commission, with certain other powers, by the express grant of the statute, and that his subsequent control over it, except in the cases designated, is by virtue of his office and jurisdiction as Lord Chancellor. I am not of this opinion; and a brief recurrence to some of the leading cases will show that it cannot be supported; on the contrary, that all and every power he exercises over bankruptcy, is derived, either expressly, or by construction and implication, from the statutes: that he has none as a Chancery Court, or by virtue of his office as Chancellor; that the two jurisdictions are entirely separate and distinct. The jurisdiction of the Lord Chancellor in bankruptcy is distinct from that of Chancery, 6 Ves. 782. The jurisdiction is under a *special authority*, distinct from that of the Court of Chancery, 8 Ves. 250. It is a legal and equitable jurisdiction, 15 Ves. 496. The case of *Ex parte Cawkwele*, 19 Ves. 233, was a petition for an order on the bankrupt to produce to the commissioners a deed of trust. The order was made by Lord ELDON, who says: "it is in many instances

difficult to state precisely the principle on which the jurisdiction stands, in which a bankrupt is often ordered to do that for which there is no express authority." Now if it might have been referred to the general jurisdiction of the Chancellor, there could have been no difficulty about it; nothing could be more simple; the want of an express authority would have created none. Lord ELDON then adverts to Lord HARDWICKE's opinion in these terms: "It is well we have Lord HARDWICKE's authority for it; who took a very large principle as to the jurisdiction in bankruptcy; thinking that the *legislature* having committed to the Lord Chancellor the jurisdiction in bankruptcy, he had all the authority that he had when sitting in the Court of Chancery." Well might Lord ELDON say that this was a large principle to act upon in such a case. This opinion of Lord HARDWICKE has been much relied upon by the counsel for the petitioner in support of his doctrine, that the Chancellor derives his extraordinary powers over cases of bankruptcy from and by his general chancery jurisdiction. I confess, it appears to me to admit of no such conclusion; on the contrary, it is the very strongest case we have, to show that he does nothing by his general jurisdiction, but that he obtains all his powers from the statutes, but has thought himself at liberty to use very freely his discretion in construing the statutes, in order to get, by implication, the authority he thought necessary for the purposes of justice, and the due execution of the statutes. This opinion of Lord HARDWICKE is truly the most copious stream of power that the Chancellor has drawn from the statutes, the acknowledged fountain of all his jurisdiction in bankruptcy; and it is so far from restricting that jurisdiction to the cases expressly granted, that it sets us an example in the use of construction and implication to obtain powers, which has no limits but the discretion of the chancellor or judge.—To return to Lord HARDWICKE—on what ground does he assume the large principle which gives him so much power? Is it by his distinct independent jurisdiction as chancellor? By no means—he thought that the *legislature* having committed to the chancellor the jurisdiction in bankruptcy, he had all the authority that he had in the Court of Chancery." This was his construction of the statute—his belief of the intention of the legislature—his inference from the language and objects of the statutes, and of consequence it is from them and from them only, that he assumes the jurisdiction. In the case in 14 Ves. 449, the question was, whether the commissioner could compel the bankrupt who had obtained his certificate to attend the commissioners. The chancellor said, "Without the existence of such a power, the mode of allowing certificates must be altered." He asserts that he has the power to compel the attendance of witnesses, admitting that there is no express authority given by the statute for that purpose. How then does he get it? Is it by his general chancery jurisdiction? By no means; but by implication; by construction of the meaning and intention of the bankrupt laws, which he says

" were framed with a view to the authority with which the Lord Chancellor is intrusted in his ordinary jurisdiction." But the statutes do not say that they were framed with any such view, nor is there any reference in them to the general chancery jurisdiction for their execution. It is the mere inference or implication of the chancellor, as is the opinion of Lord HARDWICKE, from the statutes themselves, from which, in some way, by construction more or less reasonable, the whole power of the Chancellor in bankruptcy is derived.

The case "*Ex parte Smith*," 19 Vez. 372, was a petition to supersede a commission of bankruptcy, because it was taken out by an attorney who was not a solicitor of chancery. No express power is given to supersede for this reason. The objection was overruled: not on the ground of a want of jurisdiction, but because " A commission of bankruptcy is a proceeding, not in the Court of Chancery; and a solicitor in Chancery has no more connexion with proceedings in bankruptcy, and is as much a stranger, as attorneys of King's Bench or Common Pleas." And so is the Chancellor, *as such*. Eden, 449, quoting Mr. Christian says, the jurisdiction of the Lord Chancellor in bankruptcy is " A subject involved in great obscurity and mystery." Why so, if it may be referred at once to the general Chancery jurisdiction?" He proceeds, " which can only be developed by attention to its history and progress, and to those general principles of the *Common Law* by *which statutes are construed*, and to those also which are applicable to every new commission emanating from the great seal by virtue of the authority of the legislature." The author then refers to the opinion of Lord ELDON in 14 Vez. 451, as " comprising every thing necessary to be known upon the subject." In *Ex parte Dufrayne*, 1 Roll. Rep. 333, it is said, the Chancellor will supersede, if *justice requires* it, although strict law would not.

The result of these authorities seem to be that the Lord Chancellor, taking the language of the statutes and the intention of the legislature for his premises, determines, by a process of reasoning and deductions from them, that he has certain powers in the execution of the bankrupt laws, which are not expressly given to him, but which he believes are incidental to the power given, and may be implied from the premises mentioned, that is, the language and intention of the legislature, and not from the great seal. Has the Chancellor a broader discretion in the construction of a law, which he is called upon to execute, than the District Judge in the same situation? They must both take the statute for their guide and authority as they conscientiously understand it. The British acts have named the Chancellor as the person or officer who is to issue the commission and hold other expressed powers. Any other person or officer might have been named, and his powers would have been the same, provided the words of the statute would have afforded the same construction or implication. With us the District Judge issues the

commission, and has other express powers, and he has also all the powers which he may deduce by a fair and legal construction of the act of Congress, and the intention of the legislature in framing that act. The sound and tenable reasoning on the subject appears to me to be this. Cases must occur in which justice to the bankrupt, justice to his creditors, the rights and interest of both, the whole scope and spirit of the bankrupt system will require, that a commission issued ought to be revoked and superseded: that its continuance would afford a benefit to no one, would injure many, would countenance injustice, perhaps fraud. Can it be then that, because the act of Congress has no enumeration of such cases, no special provision or grant of power, to prevent or arrest these evils, there is therefore no remedy for them, there is no authority over them? Such a presumption is insufferable. Where then should we look for the authority to perform this act of justice? To whom are we to presume it was intended to be entrusted? Who is to recall the commission? —the authority which is thus abused, which every one must agree ought to be recalled by somebody?

The answer would seem to be, that the jurisdiction which issued the commission ought to be, must be, in the absence of any other, and no other exists, that which shall reach it. That the judge to whom the power is given to issue the commission, has also the power to recall it, if, instead of answering the purposes for which it was issued, it is used as an instrument of fraud, of oppression, of injustice, for the destruction of the property and rights it was intended to preserve, without producing one of the benefits expected from it. If the judge should supersede, where he ought not to have done so, by a false or forced construction of the law, taking by such means a power which he was not entitled to, the act will be a nullity, and any party injured by it, can obtain ample redress. But if he has no authority to supersede his commission, the mischief will go on, and I know of no remedy for it. To apply this remark to the present case, if as has been contended on the part of the petitioner, the supersedeas was ordered without any authority; if the judge exceeded his jurisdiction in making the order, it is obviously a nullity; it does not stand in the way of the rights or remedies of Mr. Sansom, or any other person, creditor or not a creditor, having proved or not having proved under the commission; but the commission, and every right and remedy under it, now stand in as full life as on the first day of its existence. Why does not the petitioner proceed as if the supersedeas had no existence? If his judgments will avail him in any way, or to any purpose, the supersedeas opposes no impediment to their operation. If by lapse of time, or other means, he can have no proceeding by his judgments against the lands, which now seem to be the object of his pursuit, or against any other property of the bankrupt, then the revocation of the supersedeas would afford him no aid against that difficulty: it would not better his situation in the smallest degree. The supersedeas, on his argument of its invalidity, does not stand between him and these lands or impair his remedies against them. If he has lost them, it is not by a void

supersedeas. What course may he take if the supersedeas were revoked according to the prayer of his petitioner? He may proceed under the commission—have new commissioners appointed—assignees chosen—the property of the bankrupt, wherever found taken possession of and distributed among his creditors. What hinders his doing all this now? on the supposition that the supersedeas was unauthorised and is void. On this view of the case, on this ground for revoking the supersedeas, he has no interest in revoking it, because it works no injury to him or his rights. Nor can the holders of the new warrants, which it is said have been laid on the lands, a part of them in Schuylkill county, derive the least advantage from the removal of the supersedeas, be it valid or invalid. They may bring their ejectments. If the supersedeas be good and valid, they will have to encounter the title of Robert Morris, and no other, for the lands were sold as his property, and the purchasers hold them only by his title. If the warrant holders show a better one they will recover. On the other hand, if the supersedeas be ineffectual and void, still the warrant holder must meet and overthrow the same title of Robert Morris, for his creditors will defend under that title. The result then is, that whether the petitioner intends to pursue these lands under his judgments, or by the new warrants in which he denies having any interest, or by proceeding with the commission, the supersedeas, if, as he contends, invalid, will put no difficulty in his way; and he may have its validity tried by any court of competent jurisdiction he may select.

Before I leave the question of jurisdiction, I must not omit to notice the case 1 Paine, 396, "*Lucas* v. *Morris*:" A bill was filed in the Circuit Court of the United States, calling upon the defendants as trustees, to account, and to compel them to carry into execution the trust, which they had assumed as assignees of a bankrupt. One of the defendants pleaded in abatement to the jurisdiction of the Court, alleging that the matters and causes of complaint belonged *exclusively* to the Judge of the District Court. Judge Thompson, of the Circuit Court, said, that if the bill embraces *any matter* of which the Circuit Court had cognizance, the plea must be overruled, for it claims for the District Judge the sole and exclusive jurisdiction of all matters comprised in the bill. The Judge says, that he cannot discover that the act of Congress has given "*exclusive* jurisdiction to the District Judge over the *entire execution of the law.*" Certainly it does not; nothing can be more manifest; and it is equally clear, that in the matter in question before the Court, the act of Congress did not, either expressly or by any reasonable implication, give the jurisdiction to the District Judge, much less a jurisdiction entirely independent of the ordinary powers of Courts of justice. It was claimed on the broad ground that the District Judges were the sole organs to administer the bankrupt law. Now there is a wide difference between the powers of the Lord Chancellor and our judges in this very matter of control over the assignees. In England the choice of assignees is subject to a control, the largest,

most general, and unqualified of any of the authorities given to the Lord Chancellor in bankruptcy. By the 31st section of 5 G. 2, ch. 30, the chancellor may remove assignees and appoint new ones; and this control over them carries with it the authority to compel them to account: a refusal would be a good ground for their removal. By the 8th section of our act of Congress the power of removing assignees, and appointing others, is expressly delegated to the creditors, and excludes every implication of that power, or of any power incidental to it, in the District Judges. No inference then can be draw nfrom any thing that was said or done by Judge THOMPSON in the case of *Lucas and Morris*, that the District Judges possess no powers over the execution of the bankrupt laws but such as are expressly given to them; nor even that they have not the jurisdiction of the Lord Chancellor, except where it is clearly limited by the provisions of the act of Congress.

To revert for a moment to the "large principle," of Lord HARDWICKE, sanctioned in a manner by Lord ELDON, the argument, for it is *but an argument*, founded on the statutes, that because the Lord Chancellor is named to issue the commission, &c., he may *therefore* bring his whole chancery jurisdiction into the execution of these statutes, is no better than to say that because the District Judge is named in the act of Congress for the same purposes, he may exercise all his judicial authority in the administration of that act; and then by invoking the analogy, so often repeated, between commissions of bankruptcy, and executions, the power of the judge will be ample enough. With great deference to such high authority, it appears to me that neither the Chancellor or the judge have any jurisdiction over bankruptcy, *virtute officiorum*, but obtain it directly from the statutes, by express grants, or by incidents to those grants drawn from the statutes "by those general principles of the common law by which statutes are construed." Eden, 449. Whether a District Judge, in his discretion, would feel authorised to draw as largely on this fund as the Lord Chancellor has done, is another question. Whatever power they rightfully have, is by virtue of the statutes, and not by virtue of their offices.

Some authorities have been cited to show that even in England it is too late for a supersedeas, after the bankrupt has obtained his certificate. I think this principle has not been sustained. It is manifest that the power of the Chancellor over the commission continues after the certificate, from the orders he has repeatedly made upon the bankrupt, witnesses, &c. It is true that Lord ELDON says, as quoted by Eden, 434, citing, 2 Rolle, 324, *Ex parte Crowder*, "that he never knew an instance in which a bankruptcy was superseded after the bankrupt had obtained his certificate, on an objection to *the debt, trading or act of bankruptcy.*" This limitation of the objection to these objects, affords some implication that it extends no further; and we see a good reason why, after the proof of the debt of the petitioner creditor, the trading and act of bankruptcy by the bankrupt, have been acquiesced in, until he has obtained his certificate, he shall not be deprived of it by objections

to them. Eden, pursuing the subject says, that, "it has been determined that a commission *will not* be superseded after the certificate allowed, unless the invalidity appears on the proceedings." For this he cites Buck. 75, *Ex parte Levi.* By turning to the case, it will be found that it is so far from changing the ground taken by Lord ELDON, that it is merely confirmatory of it, and by no means sustains this author in his general allegation that a commission will not be superseded after certificate allowed unless the invalidity appear on the proceedings. The case was "A bankrupt had obtained his certificate, and the petition to supersede the commission was presented, on the ground that he *was not a trader* within the meaning of the bankrupt laws; and that the commission was a concerted one." The Vice Chancellor decided that "unless it appears upon the face of the proceedings that the party declared a bankrupt *is not a trader*, the petitioner is preclued from going into evidence to disprove the *fact of trading*, without he can show that the commission was fraudulent." On this decision, being one of the special cases put by Lord ELDON, Mr. Eden has raised the general proposition that "a commission will not be superseded unless the invalidity appear on the proceedings."

In *Ex parte Bass*, 4 Madd. 270, the same doctrine is given in the same restricted terms. The bankrupt will not, after having obtained his certificate, be allowed to impeach the commission, upon the ground *that he was no trader*, but he was permitted to supersede the commission, after certificate, where the title of the assignees, had been successfully opposed in an action, and the commission, therefore, becomes inoperative, as that against Mr. Morris did, from other causes. In the same sweeping way, Eden lays it down that "where a bankrupt has submitted to his commission for a considerable length of time, he cannot petition to supersede it." For this he cites, 2 Ves. 326, *Flower* v. *Herbert.* This was not the case of a petition for a supersedeas, nor for any thing that has any analogy to it. It was a motion for an injunction to stay proceedings in an action at law, brought by the bankrupt against his assignees. It was an action of trover. The bankrupt had surrendered; had submitted to an examination; he had himself petitioned for new assignees; and a year and an half after these admissions that the proceedings under the commission were right, he brought an action of trover against the assignees, denying that he was a bankrupt. The Chancellor said, that no one would accept to be an assignee, if they were to be exposed to such suits by the bankrupt, notwithstanding his acquiescence. This was no petition for a supersedeas on behalf of the bankrupt, but a prayer for an injunction against him, in a suit he had brought, under such circumstances, against his assignee.

It seems to me that the power and practice of the Chancellor over bankruptcy, in all its stages, before and after the certificate, are not confined to any specified cases, but are exercised whenever, in his sound and judicial discretion, he finds his interference right and necessary, to carry into effect the due execution of the statutes,

according to the intention of the legislature, and to prevent any abuse of them for the purposes of fraud, oppression, and injustice.

It is manifest from the course of my remarks, that if I were compelled to pronounce a decision upon the question of jurisdiction, I should, as now advised, sustain it as a necessary power for the just administration of the bankrupt law, according to the intention of the legislature, and to prevent great abuses and mischiefs if this power could not be exercised. I think, however, that I am not now called upon to express any more absolute opinion upon this point. Were I to yield to the argument against the power of the judge to order this supersedeas, it would, of itself, be a sufficient reason for refusing the prayer of the petition. Why should I do that which will be of no benefit to him; which will add nothing to his rights or remedies? Why should I oppose an inefficient, useless, revocation, to an inefficient powerless order? I should not have the reluctance or hesitation of a moment to recall an error which would restore any right of which the error had deprived him; but I should be unwilling to spread upon my records contradictory decrees, for no beneficial purpose or end to any body. The chance of the petitioner, so far as he considers the success of the prayer of his petition to be important, is better, by admitting the power of the judge to order the supersedeas, and showing that the case was not one in which the order ought to have been made, and probably would not have been made, with a knowledge of all the circumstances. I will, therefore, proceed to examine the case on the supposition that the judge had authority to order the supersedeas; and the question then will be, whether the petitioner has shown good cause for revoking it.

In this view of the case the petitioner must put himself upon his equity, as opposed to the equity of those who resist his application. At his first step he must meet and overcome the objection to his application in the character of a creditor of Robert Morris, after having forgotten or disregarded it for so many years. The peace of society, the settled condition of property, are cardinal objects of every government. To preserve them, the legislature, in some instances by positive enactments, and, in others, the courts, by their judicial discretion, have raised barriers against stale and neglected claims, which may not be passed, whatever the rights may be that are excluded by them. Such are the limitations of time upon writs of error, bills of review, &c. I shall not hold the petitioner in this case to be interdicted from a hearing, even by the extraordinary number of years that have passed away, before he made a movement for the assertion of his claim, but consider the delay only as it affects his equity under all the circumstances of the case: I do not speak of his inattention to the proceedings for obtaining the supersedeas—he says he had no notice of them—but of his inattention to the commission, of which he certainly had notice and knowledge, and to reinstate which is the object of his present application. For thirty years he thought the commission of no importance to him; he had no right or interest in it or under it

which, in his opinion, was worthy of his attention; and now he seeks, on the ground of that right and interest, to bring back this commission to existence. We may certainly say, that he must be prepared to show strong reasons for such an indulgence. I do not say that his neglect of the claim he now urges upon me has shut him out from a fair consideration of his case. I have heard him—he has been faithfully and ably defended, and I shall endeavour faithfully, at least, to do him justice, not overlooking the justice that may be due to others. I must here recur to his conduct during the progress of the commission. He saw the whole proceeding entangled and finally stopped by impediments he could have removed at once, but he stirred not. Having securities which put him in a better situation than other creditors, he let them struggle in endeavours which he thought would be fruitless, while he declines to share the labour, or put one dollar at hazard in the attempt. After a lapse of many years, the family of the bankrupt discover some property, or some interest which he had in property, which was going to waste and ruin, because there was nobody to attend to it. The creditors, and the petitioner among them, had for five-and-twenty years abandoned the whole concern, and there was no power in the family of the bankrupt, or in any body, to make them or him return to it. What was to be done? Was the property, whatever was its value, to be lost, for want of an owner? If the creditors would not have it—if Mr. Sansom rejected all interest in it—should it not revert to the party who had assigned or tendered it to them, provided there was a power in the law to return it to him. Why did Mr. Sansom disregard for so many years, the commission he now thinks of so much value to him? It was known to him—he was called upon again and again to appear with his claims as a creditor before the commissioners. He did not—he would not appear. Nobody knew, officially, that he was a creditor—that he had any claims upon the bankrupt, or his effects—any interest in what was doing under the commission, or what might finally be done with it. After a lapse of thirty-five years, he wakes up—he comes forth from his obscurity, and presents himself here as a creditor of Robert Morris, having an interest in the commission of bankruptcy, which entitles him to the favour of the judge, by the revocation of an order deliberately made, in relation to that commission. He asks that this order may be expunged or revoked, in order that he may be allowed to enrol himself under the commission as one of the creditors of Robert Morris, for no other creditor asks for it; he now wishes to prove his debt before the commissioners, and to reinstate the commission with all its legal rights and consequences. He seems to be either one of the *sleepers* for whom the law will not watch; or one of the *watchers* who look quietly upon the labours of others without sharing them, but keep themselves ready to seize upon any benefit that may result from them.

What reasons has the petitioner offered to justify or explain his long inaction in relation to his rights and interests as a creditor of Robert Morris? I have no reference now to any proceedings

under his judgment, or to the validity of that judgment, as it may or may not be affected by time. He has offered some reasons which he thinks should rebut the presumption of satisfaction of his judgment by lapse of time—which may be hereafter adverted to. But that is a secondary question on this application, which is not for the revival of the judgment, or to authorise any proceeding under it. For my present object, I may consider that he has a debt, that might be proved under the commission. He asks that the commission may be reinstated, for the sole purpose of admitting him to that proof. He asks that an order which superseded that commission. and which in the present inquiry is assumed to have been authorised and valid, shall be revoked, that he may have the opportunity to present his claim to the commissioners, and make such proof there of the validity of his debt, as may be in his power. It is clear, then, that the delay, the neglect which he has to account for, is not of his judgment, but of the opportunities which were afforded to him for thirty years, to do that which he now desires to do. I have no recollection that any explanation, legal or equitable, has been offered for Mr. Sansom's declining for so long a time to prove the debt he now wishes to prove. The four reasons for inaction were applied to his judgment—to his debt, to show that it was not lost by lapse of time. But none of these were used, or could be used, to explain his neglect of the commission, and his entire disregard of the rights under it which he would now recall and reassume. These reasons were—the bankruptcy and death of Mr. Morris—the difference between a judgment and a bond—and his ignorance of the existence of the Schuylkill lands. Granting that these may have been the motives for taking no proceeding under his judgment, and without anticipating how effectual they may be to preserve his debt from extinction under the pressure of thirty-five years, it is enough to say, that they do not account for, justify, or explain, his delay to prosecute his rights under the commission.

I will now suppose this objection is removed or waived; still it is incumbent on the petitioner to satisfy me that he will gain some benefit—some substantial and adequate benefit—by obtaining the prayer of his petition. I will not revoke a decree rightfully and deliberately made, after so long an acquiescence by all interested in it, and most especially after rights have been acquired under it, unless it is clearly shown to me that justice to the petitioner requires it, and that justice will be measured, in part, by the advantage he is to gain by it. If it be clear he can gain nothing, he has no justice to support him—he will be a mere stranger intruding himself into a proceeding in which he has no interest. If his interest be but nominal, or so inconsiderable, as not to be worthy of regard, the judge would not disturb a decree from a repose of six years, and, assuredly, will not put in jeopardy or doubt the interests of others, to gratify such an application. It is a maxim ever of the common law, that "*de minimis non curat lex,*" and new trials have been

refused, on the ground of the insignificance of the interest of the party, who otherwise would have been entitled to it. It is clear, that in this case, the petitioner can gain nothing by his petition and the order he prays for, but the opportunity to prove his debt under the commission, and to receive such a dividend of the Schuylkill lands, which is all the property of the bankrupt known to us, as his debt will entitle him. The inquiry, then, to which a judge, acting on a broad and equitable discretion, will turn, is, whether the petitioner can obtain this benefit by reopening the commission, and what will it be worth to him? The judgment which is the evidence of his debt, is now nearly forty years old, almost double the period which the law allows to the existence of it as a debt. His last proceeding on it was in 1805—more than thirty years before his present application. Could the commissioners of the bankrupt admit such a debt to be proved, or such a creditor to participate in the distribution of the effects of the bankrupt? If it stood naked and alone, it is, in my opinion, most manifest, that either the bankrupt, if living—or his representatives, as he is dead—or any of his creditors, objecting to the admission of such a debt, the commissioners would have no legal right to receive it; and if received, it would be expunged, as in the case in 15 Ves. 479. The examination of the numerous cases on this point has occupied a large portion of the argument of counsel on both sides. I forbear to examine them. The general effect of such a lapse of time upon a payment is not denied; but it is alleged, that this effect, which is but a presumption of law, may be explained and rebutted by circumstances—by evidence, which, in the opinion of a court and jury, would keep the debt alive; and that the petitioner has a right to go before the commissioners, or to a jury, at his election, to satisfy them that he has such circumstances and evidence as would relieve him from this presumption—would account for his delay, in a manner to preserve his debt. This is true; but in order to induce me to grant his petition on this ground, it is incumbent upon him now, and here, to satisfy me that he has such evidence and such circumstances in his power, not as absolutely as might be required of him by the court, but sufficiently so to convince me that he has some fair and reasonable ground to go upon—some probable legal expectation of making out his case, if the opportunity is accorded to him. In an application to a common law court to open a judgment and let the party into a defence, the court will be well satisfied that he has an available defence, before they will disturb their judgment. It is not enough for him to say—Give me the opportunity, and I will try what I can do with it—he must show to the judge for whose interference he applies in his behalf, what his reasons are, and that he has a good case to exhibit. In the present case, I do not think that, as *matter of law*, the facts and circumstances relied upon by the petitioner could avail him to avoid the consequences of the lapse of time upon his debt. Should he go to a court, I must presume that the judges would take the decision of the law upon themselves; and as to the facts, taking

them to be just as the petitioner has represented them, they are altogether insufficient to entitle him to relief. I do not again repeat them, or go into the detail of my reasons for this opinion. It appears to me to be obvious, that neither the bankruptcy and death of Mr. Morris, nor the alleged difference in the law between a bond and a judgment, nor the petitioner's ignorance of the lands in question, are sufficient apologies for his neglecting to take the prescribed and ordinary means of keeping his debt alive, for any contingency that might be beneficial to him. Why should I open a commission for such a claim, which, with my opinion of it, I must believe would not be received by the commissioners, or by any other tribunal to which the petitioner might carry it. If I should refuse the prayer of the petition if no reason were offered for his inertness for five and thirty years, I may, and ought also to refuse it, when the reasons offered to remedy this defect, are to me clearly insufficient: and particularly when those reasons are of a character that would fall under the dominion of the court, rather than of a jury, consisting of undisputed facts, and leaving the legal inferences from them only to be determined. The effect of the bankruptcy and death of Mr. Morris upon the lapse of time, are, in my opinion, clearly questions of law for the decision of the court, and not of a jury; so also is the supposed difference between a bond and a judgment, in this respect. The fourth reason—that is—the ignorance of Mr. Sansom of the existence of the land in question, is more of a mixed question, but I cannot suppose that either a court or jury would consider it as a good reason for such laches, or as avoiding the legal effect of time upon the debt. If he meant to take the chance of the discovery of property, he should have kept his judgment in a situation to avail himself of it; otherwise, we should, I think, have had heretofore, and shall have hereafter, the same defence set up in very many cases. If it is enough for a plaintiff to say that he did nothing under his judgment, because he did not know of any property to levy it upon, it is obvious how easy it will be to defeat the wise provision of the law which requires diligence of him. The reason is good, perhaps, for not taking out an execution, but certainly it does not account for the neglect to keep the judgment alive, by the inconsiderable trouble and expense of issuing a *sci. fa.* once in every five years.

It must be understood, that I do not put my ultimate decision of this case upon this ground. It may be that I am mistaken on it; it it may be that the commissioners, or a court and jury, would admit the proof of the debt, notwithstanding the lapse of time against it; it may be that they would deem the reasons of the petitioner for his inactivity sufficient to rebut the presumption of law; but it will be seen that my argument against the present application, is independent of the existence or non-existence of the debt of the petitioner; although, indeed, if he has no debt, it is, of itself, a sufficient reason for rejecting his petition. But if the judgment had been duly kept alive—if it were now a good and subsisting debt—the objection remains, which I think is fatal to this application to the equity

and discretion of the judge, that the petitioner has neglected for thirty-five years, during the whole of which time it was in his power, to do that which he now desires to do, and to allow which, he calls upon the judge to review a proceeding of six years' standing, and to revoke a decree under which valuable rights have been acquired. This is the radical defect of his claim. There is no equity in such a petition.

There is another consideration, of no imposing weight, in the legal aspect of the case, but which bears strongly upon its equity. If it were certain that Mr. Sansom will take upon himself to proceed with this commission—to have new commissioners and new assignees, who will accept the trust, appointed; and that the commissioners will admit the proof of his debt, and all this must be done, or he has no object or interest in the success of his petition—then I may inquire whether he will have such an interest in revoking the supersedeas, and restoring the commission; whether he can derive such a benefit from it as will justify me, in the exercise of a sound and equitable discretion, in annulling a decree made so deliberately and so long ago, and in taking the hazard of the wrongs and injuries which it may inflict upon others who have put their faith in the permanency of the decree;—can I hesitate to see on which side the strongest, the preponderating equity lies. It is hardly credible, that the petitioner would proceed with this commission, when, from any calculation I have been able to make on the facts now before me, he could never receive from it, one half of the amount of the expense of his first step. He could not obtain the first meeting of the commissioners for twice the sum he will, if his whole claim is allowed, receive from them. I will not presume that he is struggling to gratify his pride or his resentment by a barren victory, which he never intends to prosecute to any result, but, having succeeded in annulling the supersedeas, will leave the commission as he found it. I confess, that nothing in this case, from the beginning, has been so obscure to me, as the object of the petitioner. It is admitted that his judgment cannot be aided, as their liens are certainly gone; and indeed no advantage is claimed or expected by him, but to prove his debt, under the bankruptcy, and I have shown what that is worth. It is no answer to say, that if he has *any interest*, however small, it is enough for this application. He addresses himself to the discretion of the judge, on the equity of his case, and it is the duty of the judge to look to other parties and their equities, which may be affected by his decision.

I might well stop here, but it will perhaps, be more satisfactory and just to one of the parties who has opposed this petition to say a few words upon a part of the cause which has occupied a considerable portion of the discussion, and excited much of its animation. I mean the interest of Mr. Rawle in the supersedeas, and in the lands he has purchased, since it was awarded. The facts are, that a certain judgment was rendered against Mr. Morris, at the suit of Joshua B. Bond, in March, 1797. On this judgment a *testatum fi. fa.* issued on the 1st February, 1798. Here it rested until April,

1830. In the mean time the plaintiff, J. B. Bond died, and his administrator, *for the use of William Rawle*, on the 1st day of April, 1830, issued a *scire facias* against the representives of Robert Morris, who was also dead, to revive the judgment. On the 6th of December, 1830, judgment was confessed on the *scire facias*, by Mr. Williams, who appeared as the attorney of the defendants. The original judgment being thus revived, a *fi. fa.* was issued which was levied on certain unimproved lands, now in Schuylkill county; they were sold under a *venditioni exponas*, in October, 1831, and William Rawle, jun. Esq. was the purchaser for the consideration or sum of $5,100. It is evident that these proceedings if they were objectionable, can have no direct operation or influence to help the petitioner if his case is defective in itself; so far indeed as he has been opposed by the claims of Mr. Rawle, as a *bona fide* purchaser on the faith of the supersedeas, he may inquire into the good faith of the purchase to resist the equity of the claim; beyond this it is of no importance what were the circumstances of that sale and purchase, or who are interested in them. But in justice to Mr. Rawle, I ought not omit to take some notice of these proceedings. The allegations on the part of the petitioner are, that Mr. Rawle, in truth paid no money for this purchase, and that the representatives of Mr. Morris are interested with him in the purchase, and that for part of it he was a trustee for them. Is there any force in these objections either as they apply to the case before me, or for any purpose? If Mr Rawle was a *bona fide* assignee, and holder of Mr. Bond's judgment, and that has not been questioned, there was nothing unusual, improper, or illegal, in his becoming the purchaser of the property at the sheriff's sale, nor in his being allowed to give a credit on his judgment for the purchase money. If Mr. Sansom had any objection to this, legal or equitable, he might have called upon the sheriff to bring the money into court, and then the question would have been examined and decided by the proper tribunal, and not left for us on this petition. But he comes here to cure all his delays and delinquencies. It is clear that Mr. Sansom knew that this course was in his power, for the motion was made in the Court of Schuylkill County, which refused to consider it for want of jurisdiction, as the process under which the sale was made, had issued from the Supreme Court. The motion then might have been renewed in the Supreme Court; and the right of Mr. Rawle to pay for the land in this way, with every other objection connected with it, would have been fully attended to and finally determined. I can see nothing in this objection; it does not impeach the legality or good faith of the sale and purchase. Nor is there any thing more in the other objection, that Mr. Rawle is a trustee for the representatives of Mr Morris as to part of the land. And why may he not be? for part or for the whole? Mr Rawle appears at the sale, a good and lawful purchaser; he is the highest and best bidder; he is able and willing to comply with all the terms of the sale, and if he does so, is it any objection to his title, or the propriety of the whole transaction, that other persons, the representatives of the original

defendant in the suit, are interested in the purchase, are to answer to him for a portion of the purchase money, and to share with him a portion of the land? I cannot see it; this is purely an affair between themselves, and is no more liable to objection than if Mr. Rawle, after his purchase, had sold a part of the land to the same person. This trust, if it existed, had no effect upon the sale, for it is not pretended that it was known, and even now rests only on conjecture. If, however, it was an objection to the sale, it is now too late to make it; the occasion is gone by. "When the sheriff comes to acknowledge his deed, the Court may, if there has been fraud or unfair practices, set aside the sale." Wharton's Dig. 213.

The interest which the representatives of Mr. Morris had in superseding the commission of bankruptcy; and that they expected to derive some benefit from the property which would be liberated by the supersedeas from the operation of the commission, has never been concealed. On the contrary it was their open and avowed object, and their manner of obtaining it, if free from fraud and unfair practices, is of no moment. The supersedeas was ordered on the application of Henry Morris, one of the children of Robert Morris, and the ground of it was the waste and loss of property, which had taken place by locking it up under the commission, and the hope of rescuing what might remain. It was known that the effect of the supersedeas would be to annul the commission and all that had been done by, and under it, and to restore to the representatives of the bankrupt the property which had not been legally disposed of. Why did the children of Mr. Morris move in the thing, if they did not expect some benefit from it? Now these representatives appear here as distinct parties, to support for themselves, the order that was made on their petition; and if Mr. Rawle's equity as a purchaser subsequent to the supersedeas and on the faith of it, were really liable to objection, it cannot affect the rights of the representatives of Mr. Morris, nor the property which has accrued to them by virtue of the supersedeas. Whether the lands purchased by Mr. Rawle constitute the whole property that has reverted to the bankrupt, I do not know, nor perhaps, can it be certainly known by the parties; but if the commission is reinstated, that, as well as any other that may exist, will be wrested from them and brought back to the power of the commission.

If in superseding this commission, I transcended the powers delegated to me by the law, it is my consolation that it was a null and powerless act, which can do no injury to the rights of the petitioner. On the other hand, if that order was an authorised exercise of my authority and jurisdiction, it is a satisfaction to me, of great value, that I have given a close and attentive hearing to an able and laborious argument on behalf of the petitioner, in which learning and ingenuity were equally displayed, and that in deciding the case, I have omitted no means in my power, of reflection and research, to come to a sound and just conclusion.

I order that the petition be dismissed.

February 3d, 1837.

Joseph and William Kite, Printers.